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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners,

v.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF AMICUS CURIAE OF THE CITY OF SAN JOSE AND THE CITIES AND TOWNS OF ALAMEDA, ANAHEIM, AZUSA, BERKELEY, CARPINTERIA, CARSON, CATHEDRAL CITY, CHINO, CHULA VISTA, CLEARLAKE, CLOVERDALE, COACHELLA, COMMERCE, COTATI, DEL REY OAKS, EL CAJON, FAIRFIELD, FREMONT, GLENDALE, GROVER CITY, GUSTINE, HAYWARD, HEALDSBURG, IMPERIAL BEACH, INDIO, LA MESA, LAVERNE, LAFAYETTE, LANCASTER, LIVERMORE, LOMA LINDA, LOMPOC, LOS ANGELES, LOS GATOS,

(Amici Continued on Inside Cover)

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INTEREST OF AMICI

Amici are more than eighty (80) cities and counties in the State of California. Included are communities with mobilehome rent control ordinances (some have vacancy control and some do not) as well as communities with no intent to enact mobilehome rent control. Amici are all extremely concerned that the Petitioners seek expansion of the *Loretto* physical taking and the substantive due process doctrines.

Local government exercises its police power to enact regulations to protect the health, safety and welfare of its citizens in an increasingly complex economic milieu. In California, Amici are faced with burgeoning populations, severe shortages of affordable housing, decreasing availability of land and a need to address environmental constraints and quality of life issues in the land use and economic regulation decision making process.

Mobilehome rent control should not, as urged by Petitioners, become the vehicle to expand existing taking and due process doctrines.

SUMMARY OF ARGUMENT

The relationship between the landowner, who has put property to use as a mobilehome park, and the homeowner, who has rented space from the landowner upon which to place a mobilehome, is unique. Local governments have found it necessary to establish special regulations to balance the rights and equities between the landowner and the homeowner. Many of the regulations, including those challenged by Petitioners, are intended to protect the substantial investment by the homeowners in their homes while allowing the landowner a reasonable return on his or her investment. Those seeking to strike down these regulations choose to ignore their legitimate justifications.

State and local governments have broad economic and land use regulatory authority. These regulations often

have the effect of placing burdens on some for the benefit of others to promote the public health, safety and welfare. The authority to control prices, in order to balance inequities in the open market, is included within this broad authority.

The Escondido mobilehome rent control ordinance is a form of price control. While it may affect the value of the regulated property, it neither denies economically viable use nor imposes a new or unwanted use of the property. The vacancy control provision is intended to prevent exploitation of a mobilehome space shortage, taking into consideration the unique relationship between the mobilehome owner and the park owner, substantially advancing a legitimate governmental interest.

Utilizing the traditional takings analysis for economic regulations, it is clear that the provision is non-confiscatory. Neither is it a regulatory or possessory taking. Mobilehome tenancies are not physical invasions. Although existing tenants may be able to "monetize" the appreciated value of their ground leases, the Constitution does not mandate that the fee owners receive this appreciation.

There is a strong public purpose in protecting the substantial investments of existing tenants in their mobilehomes. The Escondido ordinance is carefully tailored to balance the substantial investment of the mobilehome owner with that of the park owner. Protection of the consumer welfare through this type of price control is unquestionably a legitimate purpose of governmental action.

Local governments have broad authority to regulate land use and economic relations. Clearly the due process clause does not forbid adjusting the benefits and burdens of economic life to promote the common good. The mobilehome rent control ordinance is such an economic regulation.

Amici are extremely concerned that the adoption of the reasoning in *Hall v. City of Santa Barbara*, 833 F.2d

1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), would result in a broadening of the possessory taking and substantive due process analysis which would create an unworkable legal framework for local government. We strongly urge that the *Hall* reasoning be rejected.

ARGUMENT

I. INTRODUCTION

Mobilehomes are a unique form of housing. The owner of the mobilehome itself is ordinarily a tenant who rents space in a mobilehome park. The landlord owns the park and common facilities but has no legal interest in the residential structure. Mobilehome ownership is thus a peculiar hybrid between low cost home ownership and rental housing.

Modern land use policies, combined with the ever diminishing availability of land, have created an almost monopolistic resource for park owners with regard to the availability of mobilehome space.

Despite its name, the mobilehome is anything but "mobile".[1] Not only are there a limited number of mobilehome parks with limited available space but it is often not physically possible to successfully relocate a mobilehome. In the absence of vacancy control, even in a park otherwise subject to rent control, the park owner can impose an excessive rent whenever there is an in-place transfer of a mobilehome. Because there generally is no practical way to move the mobilehome to an alternative park, when rent increases for in-place transfers are unlimited, the mobilehome owner is forced to stay in the mobilehome or to sell it at a substantially reduced value. At the extreme, an uncontrolled rent can literally make

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[1] Hirsh and Hirsh *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA Law Review 399, 403 (1988).

it impossible to give the mobilehome away. Therefore, the mobilehome owner, much more than the apartment tenant, is at the mercy of the landlord who, because of the lack of alternatives available to the tenant, can raise rents excessively.[2] Local governments have sought to balance this relationship by imposing that type of mobilehome rent control known as "vacancy control." [3]

Mobilehomes are traditionally a relatively affordable type of housing. Mobilehome owners are often senior citizens or young families with limited incomes who have invested the bulk of their savings in their mobilehome.[4]

---

[2] Petitioners blithely dismiss these concerns. (Petitioners' Brief at 29.) However, the City of San Jose repealed its vacancy control provision in 1989 in response to the *Hall* decision. At a public hearing on September 10, 1991, the San Jose City Council heard lengthy testimony describing exactly the kind of increases which Appellant characterized as "illusory." For example, mobilehome owners testified that as a result of proposed rent increases as high as 60% at the time of sale, prospective purchasers were unwilling to purchase mobilehomes offered for sale.

The Petitioners' Brief at 29 n.13 mischaracterizes the City of San Jose ordinance which in response to the dramatic testimony reimposed vacancy control very similar to the Escondido Ordinance but suspended it pending a favorable determination by this Court. Because the San Jose ordinance has been cited by Petitioners and their Amicus, The Manufactured Housing Educational Trust of Santa Clara County, we have lodged a copy of the ordinance with the Clerk of the Court.

[3] Vacancy control refers to a limitation on rent increases upon in-place transfers of the ownership of a mobilehome, i.e. when the mobilehome owner sells the mobilehome and the new owner becomes the tenant of the mobilehome park.

[4] The October 19, 1990 report by the California Department of Housing and Community Development listed 30 mobilehome parks and 3700 mobilehome spaces in Escondido. The March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior households" who are "generally small elderly families with fixed incomes." *Id.* at 5.

They are, therefore, quite vulnerable to the impact of excessive profiteering by park owners. Vacancy control is appropriate and necessary to balance the relationship between park owner and homeowner for the protection of these consumers.

II. MOBILEHOME RENT CONTROL IS A VALID SPECIES OF ECONOMIC OR LAND USE REGULATION.

A. Local Government Has Broad Economic and Land Use Regulatory Authority.

State and local governments have broad authority to adopt regulations, which have the effect of placing burdens on some for the benefit of others, to promote public welfare. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

Price controls which limit the profits of producers or vendors for the benefit of consumers are permissible police power regulations. For example, in *Munn v. Illinois*, 94 U.S. 113 (1877), the Supreme Court upheld the constitutionality of state provisions which allowed the legislature to fix the maximum rate to be charged for the storage of grain in warehouses. Similarly, in *Nebbia v. New York*, 291 U.S. 502 (1934), the Supreme Court upheld a state statute which permitted a Milk Control Board to fix the minimum and maximum retail charges to consumers. In striking down a challenge to this regulation, the Supreme Court stated: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Id.* at 539.

The mere fact that value is shifted from one segment of the community to another by government regulation does not make the regulation unconstitutional. All price

control regulation limits the profits of the provider by reducing the amount which the consumer would otherwise have to pay to the provider. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Price controls may be enacted in order to prevent "speculative, unwarranted and abnormal" price increases and "to protect persons with relatively fixed and limited incomes . . . from undue impairment of their standard of living." *Yakus v. United States*, 321 U.S. 414, 420 (1943).

Land use controls similarly have the effect of limiting the profit of the landowner. Often the imposition of a land use control on one piece of property will concurrently increase the value of nearby property. The mere fact that a property owner's potential profit is severely diminished by regulations that serve to benefit others does not result in a constitutional violation. In the seminal case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a zoning law, adopted for the public benefit, which resulted in a 75% reduction in value of private property was upheld.

In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), a landmark preservation law was upheld although it resulted in a land owner being denied the ability to build a proposed fifty story addition to the existing structure, severely limiting its development potential, to the benefit of neighboring property owners as well as the City.

In *Agins v. Tiburon*, 447 U.S. 255 (1980), the Court upheld a zoning ordinance which restricted development of the privately owned property to construction of between one and five single-family residences on a five-acre tract resulting in a severe limitation of the development potential and a reduction in property value.

It is axiomatic that virtually all zoning laws benefit certain properties to the detriment of others. These land

use regulations find their validity in the intended overall benefit to the residents and property owners of a jurisdiction.

B. Local Governmental Entities Have Broad Power to Regulate the Landlord-Tenant Relationship.

The Supreme Court has consistently held that local public entities have broad power to regulate the landlord-tenant relationship. In *Pennell v. The City of San Jose*, 485 U.S. 1 (1988), this Court upheld, from a facial challenge, a provision in the City of San Jose's Rent Control Ordinance which allowed a hearing officer to consider, among other factors, the hardship to the particular tenant when determining whether to approve a landlord's proposed rent increase in excess of eight percent (8%). This Court reiterated: "We have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" *Id.* at 12 n.6. The fact that the landlord can receive less when the tenant can afford less did not make the ordinance facially unconstitutional.

In *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987), this Court upheld the fixing of a rental rate that could be charged to cable companies by utilities for use of the utility's power poles by the cable companies. The price fixed by the Federal Communications Commission resulted in a substantial reduction of income to the utility company as compared with the rate previously agreed upon between the utility and the cable companies, thereby creating a "windfall" for the cable companies. Even with this substantial economic shift, the Court found no taking.

C. Mobilehome Rent Control With Vacancy Control Is Based on a Proper Public Purpose.

1. *The Escondido Ordinance Prevents Exploitation of a Mobilehome Space Shortage.*

This Court has long acknowledged the general purposes served by rent control regulation. "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). "Indeed, a primary purpose of rent control is protection of tenants." *Pennell*, 485 U.S. at 13.

The purpose of a vacancy control mobilehome rent control ordinance is to balance the homeowner/parkowner relationship by protecting the mobilehome owners' substantial investment from excessive and unreasonable space rent increases which could prevent them from selling their homes, or force them to abandon their mobilehomes, or at minimum, substantially reduce the value of the mobilehomes. The rent control ordinance is important to prevent park owners from taking unconscionable advantage of the mobilehome space shortage in California.

2. *The Unique Relationship Between a Mobilehome Owner and A Park Owner Makes Vacancy Control an Important Element of Mobilehome Rent Control.*

Mobilehome owners, unlike typical apartment tenants or residents of other rental housing, are in the unique position of having made a very substantial investment in a residence for which space is rented or leased.[5] Removal or relocation of a mobilehome from a park space is generally not a practical alternative to an in-place transfer.

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[5] Manheim, *Tenant Eviction and the Taking Clause*, 1989 Wis.L. Rev. 925, 956 n.179, notes that modern mobilehomes often cost between $30,000 and $75,000.

Often the older mobilehomes do not meet the standards required to move into other parks today. Even if an alternative site is available, the move can only be accomplished at substantial cost and often may cause extensive damage to the mobilehome. It also may result in a loss of integrated landscaping and supporting structures. This unique situation was articulated best by the State of California legislature when it adopted eviction protection for mobilehome owners in Civil Code § 798.55, which reads in part as follows:

> The legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter.
>
> California Civil Code § 798.55 (Deering 1983)

The Escondido mobilehome rent control ordinance with its vacancy control provision is intended to protect the significant investment by mobilehome owners in their mobilehomes while at the same time providing to park owners a fair and reasonable return on their investment.

The legitimacy of this purpose was *even* acknowledged by the Ninth Circuit Court of Appeals in the recent case of *Azul Pacifico v. City of Los Angeles*, 91 C.D.O.S. 8840, —— F.2d —— (9th Cir. 1991). The court stated in this regard:

> [T]he ordinance does protect *existing* tenants from being forced to sell their coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach. . . . The correctness of the city's decision to insure coach owners against unscrupulous land-

> lords in this way is a legislative question, not a judicial one.

Id. at 8842.

III. THE MOBILEHOME RENT PROTECTION ORDINANCE IS NOT AN UNCONSTITUTIONAL TAKING

A. Economic Regulation Is Permissible as Long as It Is Not Confiscatory; the Mobilehome Rent Protection Ordinance Is Not Confiscatory.

In *FCC v. Florida Power Corp.*, 480 U.S. at 253, this Court reiterated that price control regulation may stringently limit the return on investment, but "[s]o long as the rates or rents are not confiscatory, the Fifth Amendment does not bar their imposition."

The relationship of the taking clause to economic regulation was clearly expressed in *Connolly v. Pension Benefit Guarantee Corporation*, 475 U.S. 211 (1986).

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

Id. at 223.

The mobilehome rent control ordinance with vacancy control adjusts the benefits and burdens of economic life to substantially advance a variety of legitimate government interests, including concern about the ability of mobilehome owners, many of whom live on fixed and limited incomes, to transfer their homes, as well as the protection of the substantial investments by these mobilehome owners. Park owners who take advantage of the

mobilehome space shortage and the unique relationship between mobilehome owners and park owners to charge unreasonable and excessive rents directly create the problem which cities and counties are attempting to solve. Limiting this excessiveness, even if it results in a significant benefit to the mobilehome owners, is not unfair nor unjust.

B. Under a Land Use Regulation Takings Analysis, the Mobilehome Rent Protection Ordinance Is Not a Taking.

The mobilehome rent control ordinance challenged in this action regulates the economic relationship between the park owner landlord and the mobilehome owner tenant. The validity of the ordinance as an economic regulation has been shown. To the extent that the rent control law also operates to regulate the property relationship between the landlord and the tenants it is also a valid regulation of land use.

Land use regulations is found not to effect a taking if it substantially advances a legitimate state interest and does not deny an owner the economically viable use of his or her land. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Court in *Nollan* held that there must be a sufficient nexus between the challenged provision and a legitimate state interest. *Id.* at 837. The mobilehome rent control ordinance with the vacancy control provision, directly and substantially furthers the legitimate government interest in preventing park owners from exploiting a mobilehome space shortage and the unique relationship between mobilehome owners and park owners at the expense of the mobilehome owners. (*See Azul Pacifico*, 91 C.D.O.S. at 8842).

Furthermore, there is no question that the challenged regulation does not deprive the landloard of an economically viable use of his or her land nor unreasonably impair its value so as to interfere with investment backed

expectations. *Agins v. Tiburon*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 130-131 n.27. The park owner continues to fully utilize the property for its intended purpose and is not foreclosed from collecting or even, under certain circumstances, raising rents. The ordinance provides the landlord with a fair return on his or her property. (Joint Appendix at 24-28). As noted by the California appellate court: "Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a 'fair' rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no 'taking'." *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 1354 (1990).

Clearly, there has been no taking under the regulatory takings analysis.

IV. OCCUPANCY OF RENTAL PROPERTY AT REGULATED RENTS WITH VACANCY CONTROL DOES NOT CONSTITUTE A POSSESSORY TAKING.

The essence of Petitioners' argument is that the Escondido Ordinance deprives mobilehome park owners of a valuable property interest and transfers it to tenants. They claim the transfer is a result of a permanent physical occupation of land and is subject to the more rigorous analysis of "possessory takings" pursuant to the holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This theory was adopted by the court in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). The *Hall* court, based on an expansive interpretation of *Loretto*, held that a Santa Barbara ordinance had "transferred a possessory interest in . . . land to each of . . . [the] tenants." *Id.* at 1276. "[T]his interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent." [6] *Id.* at 1276.

[6] In *Pennell*, this Court specifically declined to address the contention that the anti-eviction provisions of the San Jose law combined with lower rents for hardship tenants amounts to a physical taking. 425 U.S. at 11.

However, the holding of *Loretto* is "very narrow" [7] and is totally inapplicable to the mobilehome rent ordinances adopted by the cities of Santa Barbara and Escondido.

A. Rent and Eviction Controls Do Not Result in Permanent Physical Occoupation of Land by a Third Party.

1. *A Taking by Physical Occupation Requires Both Uninvited Use and Uninvited User.*

A physical taking requires a governmentally authorized occupation by an uninvited user. This requirement was described in *FCC v. Florida Power Corp.*, 480 U.S. at 252-253 as "the unambiguous distinction between a . . . lessee and an interloper with a government license." [8] Not only was the occupying cable company in *Loretto* an uninvited user or "stranger", 458 U.S. at 436, so too was the use made of the property by the cable company a new, unintended, and uninvited use. *FCC* v. *Florida Power Corp.*, *Id.*, illustrates just how critical this element is. Because the Act challenged in that case did not "require a power company to dedicate a portion of its pole plant to communications use," *Id.* at 251 n. 6, *Loretto* was held to be inapplicable. "[I]t is the invitation, not the rent, that makes the difference." *Id.* at 252.

Eviction limitations which merely extend tenants' right of occupancy do not transform a rent control ordinance into a "possessory taking". This Court has long acknowledged that eviction protection is a necessay incident of

[7] 458 U.S. at 441.

[8] *See also* Patterson, *Property Rights In The Balance—The Burger Court And Constitutional Property*, 43 Md. L. Rev. 518, 539 n.22 (1984) ("the scope of the constitutional property interest does not encompass protection against intrusion by invitees").

rent control. *Block v. Hirsh*, 256 U.S. at 157-158 (1921).[9] *See also Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984); *Taylor v. Brown*, 137 F.2d 654 (Emer.Ct.App.), *cert. denied*, 320 U.S. 787 (1943) (cited with approval in *Parker v. Fleming*, 329 U.S. 531 (1947)); *Flynn v. Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981); *Jambes v. Veale*, 132 Misc. 2d 481, 504 N.Y.S.2d 982 (1986). It is clearly not a taking to authorize a tenant to remain on the property at reduced rents essentially indefinitely. Consequently, it is difficult to imagine how it becomes a taking because rent control continues when the tenant leaves.[10]

Once the park owner has voluntarily chosen to rent the mobilehome space, a taking does not occur merely because the tenant in possession can transfer that tenancy to another. While the particular user might not have been selected by the landlord, the use surely was.[11] By renting to tenants initially, the landlord has voluntarily yielded certain rights associated with possession. Occupation of rented property by tenants is the core of the landlord's "investment-backed expectation." The statutory extension

[9] The Court in *Loretto* specifically approved *Block v. Hirsh* and *Edgar A. Levy Leasing v. Siegel*, 258 U.S. 242 (1922), reading those cases as not involving government action which "authoriz[ed] the permanent occupation of the landlord's property by a third party." 458 U.S. at 440.

[10] The court in *Hall* attempted to distinguish ordinary rent control because that required a tenant to make "difficult choices: if he wants the benefits of the rent control ordinance, he must stay put. If he wants to leave, he must give up a good thing." 833 F.2d at 1279. It is not clear how this distinction can transmute an otherwise valid economic regulation into a taking.

[11] *See Tirolerland v. Lake Placid 1980 Olympic Games*, 592 F. Supp. 304, 314 n.7 (N.D.N.Y. 1984) rejecting taking challenge to ordinance limiting room rates and tenant eligibility, "the Court has serious doubts whether an interference with the right to select one's tenants can amount to an unconstitutional taking".

of an existing intended use is not tantamount to possession.[12]

The important consideration in the analysis is whether the physical occupation is equivalent to an involuntary ouster—dispossessing the owner of essentially all rights in the occupied property. In *Loretto*, the cable company had the right to come onto the property in the first instance, to choose the location of the cable, to expand use to additional parts of the building, and to assign its rights to a successor company, all without the consent of, or payment to, the landlord. Above all, the cable represented a new use, not one that the landlord had voluntarily assumed. 458 U.S. at 423-424. However, where the owner has selected the use and still derives fair and reasonable return on that use, no taking by physical occupation has occurred.

2. *Even With Vacancy Control, Petitioners Retain the Intended Use With an Invited User.*

Petitioners have voluntarily chosen to operate mobilehome parks. The very essence of operating a mobilehome park is space rental to mobilehome owners. With or without vacancy control, as long as the park owner continues to choose to maintain his or her property as a mobilehome park, rented park spaces will be occupied by tenants-in-possession paying rent to the park owner. The

[12] In *FCC v. Florida Power Corp.*, the Court suggested that this was an open question. "We do not decide today what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id.* at 251-252 n.6. However, this referred to the property owner's right to change use, not merely to continue it with a different occupant. Statutory lease extension has no affect on the landlord's use of the property, nor does it deprive the owner of "control over the timing, extent, or nature of the invasion." *Loretto*, 458 U.S. at 436. The Escondido Ordinance does not restrict the use of the property. Indeed, the California Mobilehome Rent Law specifically authorizes termination of tenancies pursuant to a change in use. *See* California Civil Code § 798.56.

physical occupation by the tenant is a result of the park owner's decision to utilize his or her property as a mobilehome park.

The only distinction between a park with vacancy control and one without vacancy control is that under the former the park owner is unable to maximize rents by charging excessive rents at the time of the sale of a mobilehome. Nonetheless, the use of the property remains as intended by the park owner and the park owner will continue to obtain fair and reasonable rent for the leased space. Clearly, no taking by "physical occupation" has occurred.

B. There Is No Possessory Interest Taken from the Park Owner.

Petitioners' *Hall* theory relies heavily upon the contention that a departing mobilehome owner can sell the right to permanently occupy the landlord's property at reduced rents, and keep the proceeds of that sale. The court in *Hall* distinguished the Santa Barbara type ordinance from typical rent control on the theory that it enabled an outgoing tenant to "liquidate" the rent savings "and take [it] with him when he leaves the property." 833 F.2d at 1279.

This *Hall* analysis incorrectly focuses on what the mobilehome owner has gained rather than on what, if anything, the parkowner has lost. The parkowner is in absolutely no different economic position when the mobilehome owner sells the mobilehome with vacancy control than when the mobilehome owner continues to occupy the space (with or without vacancy control).

If a price control is, itself, constitutional, the fact that a consumer realizes a monetary benefit after his or her use of the commodity ends does not compel a different conclusion. Otherwise, any mechanism which controlled wholesale but not retail prices would be unconstitutional

because the retailer can pocket the "monetized" value of the wholesale price reduction when reselling the item at an unregulated price.[13]

1. *Vacancy Controls Do Not Extinguish Reversionary Rights.*

The fact of governmental restrictions on owners' ability to select incoming tenants is unremarkable in the heavily regulated rental housing business. For instance, anti-discrimination statutes severely circumscribe landlords' ability to reject tenants for non-business reasons.[14] Park owners have placed their product on the market and consequently have voluntarily subjected themselves to restriction of the right to reject users of their property.

The fact that the state or an outgoing tenant has a say in the identity of the next tenant does not take a property interest from the landlord, nor does it constitute an invasion of land. A mobilehome owner's bare right to sell his or her coach on site abrogates little, if any, possessory rights the park owner has in the property. It constitutes neither permanent nor indefinite occupation because the park owner's reversionary rights remain virtually identical and intact. The park owner retains the right to convert an individual coach to personal use, to change its use within the park (subject to generally ap-

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[13] Many of the price control schemes upheld against due process and takings challenge appear to have had this feature and effect. *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (fixing maximum on wholesale price of natural gas); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (upholding a New York law imposing maximum wholesale prices while decontrolling retail prices).

[14] This Court in *Loretto* cited with approval *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding statutes prohibiting discrimination in public places) as a permissable regulation of the landlord-tenant relationship. 458 U.S. at 440. *See also Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988-989 (1984).

plicable use restrictions), or to terminate the mobilehome park use entirely.[15] Restrictions on the ability to choose prospective mobilehome purchasers does not implicate important property rights where possession by others is the very essence of the use made by the owner.

2. *The Tenant's Ability to Reap Economic Benefit Does Not Convert Legitimate Economic Regulation Into a Takirg.*

The basic question which must be decided in this case is the viability of the *Hall* doctrine. California appellate courts, including in the case at bar, have found *Hall's* reasoning unpersuasive and have declined to follow it. The court in *Casella v. City of Morgan Hill*, 230 Cal.App.3d 43, 54 (1991) expressly rejected *Hall's* "espousal of the notion that economic regulation such as the rent control measure challenged here could metamorphosize into the type of physical occupation in *Loretto*."

Careful review of the reasoning in *Hall*, lead the *Casella* court to conclude,

> It is apparent to us that the Ninth Circuit's analysis in *Hall*—that the effect occasioned by the combination of the state regulations and the local ordinance was a "physical invasion"—was no more than a convenient means, as Professor Michelman suggested, of distinguishing a loss the court considered "clearly compensable" from one which it did not. (*Michelman, supra*, 80 Harv.L.Rev. at p. 1228). To indulge in this shorthand, however, does not explain why compensation must be paid for this regulation, as opposed

[15] *Loretto* rejected the defense that invasion by the cable was acceptable because the landlord retained the right to withdraw the building from rental service. 458 U.S. 434 n.17. The situation here is clearly distinguishable because the occupancy by the tenant is the precise use intended by the park owner and the park owner is receiving fair and reasonable rents for that occupancy. There is no unintended invasion by a third party.

> to other regulations which effect a redistribution of wealth for the general social good.

Id. at 51.

Hall transposes the court's own response to the political question about the effectiveness of rent control into its takings analysis. *See Hall*, 833 F.2d at 1281 n.26. As aptly stated by the court below in this case, "the decision whether to use rent control as a tool to correct imperfections in the market system is a political issue for legislative bodies and not a question for the courts." *Yee v. City of Escondido*, 224 Cal.App.3d 1349, 1358 (1990). Courts should not stretch a "very narrow" holding like *Loretto*, 458 U.S. at 441, "beyond the scope to which it legitimately applied." *FCC v. Florida Power Corp.*, 480 U.S. at 251.

V. THE INTEREST WHICH PETITIONERS CLAIM WAS TAKEN AND TRANSFERRED TO TENANTS IS NOT COMPENSABLE.

A. Appreciated Site Value Does Not Constitute Fifth Amendment Property.

The *Hall* theory makes much of the mobilehome owners' ability to capitalize future rent savings. Such savings, Petitioners contend, reflect the difference between market and controlled rents. Rent control in Escondido, as elsewhere, typically does not actually set rents, but imposes ceilings on rent increases. Thus, at the inception of the controls, site value is presumably incorporated into market rent and captured by the park owner. As market rents escalate, if permitted rent increases fail to keep pace, "rent savings" are created. Petitioners claim the Escondido ordinance capitalizes the savings over the anticipated life of the use generating a "windfall" for the departing mobilehome owner. Even if this were true, the question is whether the state may lawfully repose the appreciated value in the mobilehome owner, or whether it

is naturally and constitutionally the property of the park owner.

Property rights, as a general rule, are neither created nor defined by the Constitution. "[T]hey are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). Of course, once having created a property interest, the state is not at liberty to expunge it in derogation of reasonable investment backed expectations. But, unless preexisting state law guarantees property owners a right to profit from future appreciation, that anticipated gain does not constitute Fifth Amendment property. Reposing the gain elsewhere, as would occur for instance with substantial capital gains taxes or resale price controls, does not take from the property owner anything he or she already had.

1. *Appreciation Is the Result of Governmental Land Use Decisions; Appreciated Value Is Created by the State.*

The gravamen of the park owners' complaint is that the Escondido ordinance prevents them from obtaining compensation for the full appreciation of the sites in their parks, as measured by increased rents. That very appreciation, however, results from the scarcity of mobilehome sites.

This scarcity is the consequence of local land use regulations which have limited the number of mobilehome spaces within any given geographic area.[16] While some communities have employed practices which intentionally

[16] See, for example, in *Cider Barrell Mobile Home Court v. Eader*, 187 Md. 571, 574 (1980), where the Maryland Court of Appeals noted: "Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks."

place mobilehomes under a "virtual quarantine",[17] in others the limited number of parks is the unintended result of other zoning practices.[18] The resultant space shortage coupled with the relative immobility of the mobilehome creates an almost monopolistic control in the hands of the park owner.[19]

To say that this appreciation, which has been created by government action, is a property right that may not be taken without compensation, is to make government the absolute guarantor of anticipated gains. This is not the law. *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("[P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."); *Penn Central Transportation Co. v. New York City*, 438 U.S. at 130 (holding "untenable" the proposition that landowners "may establish 'a taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development. . ."); *United States Ex Rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943) ("In absence of a statutory mandate (citation omitted), the sovereign must pay only for what it takes, not for opportunities which the owner may lose.")

[17] Note Moukawsher, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 Conn.L.Rev. 811, 812 (1985).

[18] In California this space shortage continues to exist despite efforts to make sites for mobilehomes available such as laws which make mobilehomes and mobilehome parks permitted residential land uses, California Government Code §§ 65852.3 and 65852.7, and which restrict application of rent control within newly constructed mobilehome parks, Civil Code § 798.45.

[19] The district court in *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772, 781 (C.D. Cal. 1990), *aff'd in part and rev'd in part*, 91 C.D.O.S. 8840, —— F.2d —— (9th Cir. 1991), put it this way: "The mobile home market is an example of a monopoly, which is a market *failure*, rather than a market, and is a prime candidate for government regulation . . . ."

2. *Government May Repose in Mobilehome Park Tenants Part Or All of the Appreciated Value That the Government Creates.*

As this Court has pointed out: "In other contexts we have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly . . . ." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988). Here, local land use policies have created conditions that enable the park owners, absent rent control, to capture the attendant monopoly profits. There can be no question that the government can intervene to ameliorate this situation.

As succinctly stated by the Connecticut Supreme Court, with regard to an in-place sales requirement with essentially a vacancy control regulation unaccompanied by rent control, in *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002 (1989):

> Because of the scarcity of mobile home sites, resulting largely from zoning ordinances that bar the establishment of new mobile home developments, the legislature could reasonably have concluded that a substantial portion of the price paid for a mobile home purchased on-site is attributable to the continuing right to lease the site that accompanies the sale. If the mobilehome park operator could require the site to be vacated, he, rather than the tenant, would be in the position to demand for a mobile home that he had placed on the site a price greater than the home itself would bring because of the right to continued occupancy that is incident to the sale. In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, [the statute] strikes a reasonably fair balance between the

> economic interest of mobile home tenants and those of mobile home park operators.

Id. at p. 820.

Vacancy control, as in all rent control, has the effect of preventing the landlord from realizing the full value of appreciated land through unlimited rent increases. Monopoly profits are thus decreased. This is clearly constitutional.

B. This Court Has Rejected That Property Interests Can Be Fractionated So as to Establish a Taking.

In assessing a particular regulatory scheme, it is well-established that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and *extent of the interference with rights in the parcel as a whole* . . . .

Penn Central Transportation Company v. New York City, 438 U.S. at 130-31 (emphasis added).

For example, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497-98 (1987) the Court refused to treat the 27 million tons of coal that plaintiff was required to keep in place as a distinct segment of property in reviewing plaintiff's claim. Instead, the Court held that the value of the coal that was required to be left in the ground had to be compared to the value of petitioner's entire mining operations. *Id* at 498-500.

The approach taken in *Hall*, represents an abrupt departure from this well-established principle. In *Hall*, the property right allegedly taken by Santa Barbara's rent control ordinance was the right to future appreciation in the mobilehome park as reflected in the market rents

that could have been charged at the park. 833 F.2d at 1276. *Accord Azul Pacifico, Inc. v. City of Los Angeles*, 91 C.D.O.S. at 8841. There was no suggestion in the *Hall* case that the rent control ordinance rendered the mobilehome park owner's property economically unviable, prevented an owner from receiving a constitutionally required fair return, or even reduced the property value of the park as a whole. Moreover, under this regulatory scheme, mobilehome park owners retain the right to go out of business, to evict with cause, and to enter onto the premises to inspect or to make repairs. In finding a taking, the *Hall* court focused exclusively on the discrete property interest regulated by Santa Barbara's law and then determined that that particular interest had been permanently taken. Such an approach to assessing a taking challenge has no place in current jurisprudence. Had the court in *Hall* analyzed the Santa Barbara regulation pursuant to the established takings analysis, there is no question that the Santa Barbara ordinance would have withstood challenge.

The ramifications of fractionalizing property interests when undertaking a takings analysis are well-recognized. If a discrete segment of an individual's property can be viewed in isolation from the property as a whole, then any regulation which extinguishes or severely restricts that discrete segment will be found to be a taking requiring compensation. Indeed in *Keystone*, this Court addressed the far-reaching consequences that could result if fractionalization was an accepted approach in takings analysis:

> Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioner's theory one could always argue that a setback ordinance requiring that no structure be

> built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. (citation omitted).

Keystone Coal Association v. DeBenedictis, *id.* at 498.

The only recent case in which this Court found a regulatory taking solely based on a law's impact on a discrete property interest not involving a physical invasion of property is *Hodel v. Irving*, 481 U.S. 704 (1987). In *Hodel*, this Court found Section 207 of the Indian Land Consolidation Act to unconstitutionally prohibit the owner of an excessively fractionated undivided share interest in allotted tribal land to pass on their property at time of death. 481 U.S. at 716-17. Critical to the Court's determination that this law effected a taking however was the fact that the right to pass on property "has been part of the Anglo-American legal system since feudal times" (citation omitted) and the total abrogation of this right was unprecedented. *Id.* at 716.

VI. A BROADENING OF THE POSSESSORY TAKING ANALYSIS BEYOND THE "BRIGHT LINE" OF ACTUAL PHYSICAL OCCUPATION WOULD CREATE AN UNWORKABLE LEGAL FRAMEWORK FOR LOCAL GOVERNMENT.

If *Hall*'s reasoning is accepted by this Court, all rent control would be subject to a taking claim. Rent control which limits the landlord's ability to evict, even wtih vacancy decontrol, precludes the landlord from maximizing rental income. The tenant has a right to remain in the unit and pocket the benefit of the less than free market value rent. If this Court adopts the reasoning of *Hall*, will it not have, in effect, overruled *Block* as well as *Pennell* and declared all such rent control to be facially invalid?

The theory of *Hall* could be applied in virtually every land use case. *Nollan* provided local government with the

standard against which to test proposed land use regulations and conditions. Local government today looks to ensure that there is adequate remaining economic utility in light of reasonable investment backed expectations and that there is a substantial nexus between the limitations and the governmental interest being promoted by the limitation. Having made this analysis, the City Council or Board of Supervisors can act with reasonable assurance that their action will not later be found to have resulted in an unconstitutional taking. If the reasoning of *Hall* were to be adopted by this Court, it would leave local government unable to determine when it was sufficient to assess a future regulation under *Nollan* and when *Hall* applied.

Almost every land use regulation arguably takes some property interest or a "straw" in the bundle of property rights". Land use development ordinarily entails a variety of conditions and dedications which limit a property owner's use of the land and which serve to benefit other individuals as well as the public at large. For example, height limitations imposed for aesthetic purposes, or as a result of air traffic patterns, or for shadow limitation reasons, even when permissible under a *Nollan* analysis, permanently deprive the property owner of certain air rights for the benefit of others.

Density limitations and open space requirements on development permissible under *Nollan*, may well decrease the property value of the subject parcel while increasing the value of neighboring parcels. Are these requirements then subject to the "monetization" analysis of *Hall*?

Traditional dedication of access easements, flood easements and sidewalk dedication all give third parties permanent rights which intrude on the developers land. All of these requirements increase the property value of neighboring land. All are and should be analyzed under *Nollan*, not *Hall*.

VII. THE ESCONDIDO ORDINANCE IS CAREFULLY TAILORED TO BALANCE THE MOBILEHOME OWNER'S INVESTMENT AGAINST THAT OF THE PARK OWNER AND AS SUCH DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

For nearly sixty years this Court has shown great deference to legislative judgments as to whether a particular enactment advances legitimate state interest—or as the standard is often restated, whether the challenged legislation has a rational basis.[20] The Court has not concerned itself with whether a challenged regulation relating to land use or any economic issue is the best way, or even a good way to deal with a perceived social problem. *See e.g. Schad v. Mt Ephraim*, 452 U.S. 61, 68 (1981) (land use laws are valid if "rationally related to legisimate state concerns"); *see also Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (legislature "was free to decide for itself" what legislation was needed to advance the public interest); *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of a law."); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) ("We are not concerned . . . with the wisdom, need or appropriateness of the legislation."); *United States v. Carolene Products*, 304 U.S. 144, 152 (1937) ("[T]he existence of facts supporting the legislative judgment is to be presumed.")

With respect to rent control, this Court has "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for

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[20] Whether the legislation is through the legislative body of a public entity or through a vote of the residents of a public entity is irrelevant to the analysis. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676-77 (1976), where the Court noted that a referendum was "the City itself legislating through its voters."

all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhatten CATC Corp.*, 458 U.S. 419, 440 (1982). *See also Pennell*, 485 U.S. at 13.

There are some who would have this Court abandon its long-held deferential standard and retreat to the era of *Lochner v. New York*, 198 U.S. 45 (1905), in which the courts substitute their judgment for legislative determinations as to whether particular legislation "may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical*, 348 U.S. at 488.

It is this second guessing that seems to underlie *Hall*. ("[T]he relationality of rent control *vel non* may have to be reassessed in light of this growing body of thought on the subject."). *Hall*, 833 F.2d at 1281 n.26.

This Court has for decades shown great deference to legislative judgments as to the "fit" or nexus between means and ends. Even under a heightened standard of scrutiny in substantive due process analysis, however, the Econdido ordinance passes muster because of the substantial nexus between the prohibition of the unlimited rent increases upon on-site sale and the protection of the investments of mobilehome owners.

In *Azul Pacifiico, supra*, 91 C.D.O.S. 8840, ——, F.2d ——, the 9th Circuit Court of Appeals found that the City of Los Angeles' mobilehome rent control law, which is essentially the same as Escondido's, constituted a taking under the *Hall* analysis, but upheld the Los Angeles ordinance against a substantive due process attack under a theory of heightened scrutiny taken from *Nollan*. The Court read *Nollan* to require a "close analysis" of the means used in a takings case. *Id.* at 8842. Even with the heightened scrutiny, it found that the vacancy control protected existing tenants from being forced to sell their units at distress-sale prices in cases in which the park owner set the rents so high for an incoming tenant that

no one would want to buy the existing tenant's mobilehome. *Id.* at 8842. Judge Kozinski wrote:

> The correctness of the city's decision to insure coach owners against unscrupulous landlords in this way is a legislative question, not a judicial one . . . Because the vacancy control provision serves the same governmental purpose—protecting incumbent tenants —as the [Los Angeles ordinance], we cannot say that it is unconstitutional. Unlike the city's other rationales, this one falls within the traditional police power and thus there is a sufficient nexus between the challenged provision and legitimate justification.

Id. at 8842.

Whether other polices are, or are not, well-served by the ordinance—whether, for example the supply of low cost housing will increase, decrease, or remain unchanged as a result of the ordinance—are questions best left to local governments to decide. So long as the ends are legitimate and the means bear a rational nexus to those ends, local legislation such as the Escondido Ordinance does not offend substantive due process.

CONCLUSION

The mere fact that economic controls are placed on the owner of a mobilehome park to prevent excessive rent increases upon in-place transfers and that these controls result in economic benefit to the mobilehome owner does not mean there has been a taking or a violation of substantive due process.

Acceptance by this Court of the notion that regulation of the economic relationship between a landlord and a tenant results in a trespassory physical invasion of property requiring compensation would cast a shadow of doubt over all regulation of property. This Court should not retreat from its precedents that economic and property regulations are valid if a legitimate governmental pur-

pose is furthered and the property owner retains an economically viable use of the property. This Court should not accept a theory which would subject legislation to microscopic analysis of which particular property right is affected and to what extent it is impacted.

Vacancy control is a direct and rational police power regulation which advances the legitimate governmental interest in protecting the mobilehome owner from the adverse impacts of excessive rents in light of the difficulty in moving mobilehomes and the shortage of mobilehome spaces. The mere fact that economic controls which prevent excessive rent increases upon in-place transfer may result in an economic benefit to the mobilehome owner does not mean there has been a taking or violation of substantive due process. These controls do not deprive the mobilehome park owners of legitimate investment backed expectations in land or of a fair return on investment.

This Court has long recognized the right of the legislature to regulate economic and property relationships. In order to reverse the court below, this Court must reject a long line of precedent.

Therefore, the California Appellate Court decision in *Yee v. Escondido* should be upheld.

Respectfully submitted,

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